In the Supreme Court

Before : Mr. Justice Willkie

Suit No. C. L. L.024 of 1975

Between Harold Lee Plaintiff

And Kingston & Saint Andrew Corporation Defendant

23/1/76

Assessment of Damages

The plaintiff's case is that he owned a 1965 Dodge Cornet motor car since 1970. That this particular car was peculiarly suited to his needs, in that:

(a) he was a tall man - 6 feet 2 inches;
(b) he suffered from a bad back;
(c) he is a Builder, and in his business he has to travel around frequently and consequently only this car (which is medium sized) or a larger car could accommodate him in comfort.

He stated that in August 1974, he had the car extensively repaired at a cost of $791.63 (Exhibit 1). That on 30th November, 1974,, this car met in an accident with a K.S.A.C. vehicle and was extensively damaged.

In cross-examination he stated the value he placed on the car when he acquired it in 1970 was $5,000 and value at time of accident was $3,500.

As a result of the damage of his vehicle, he had an estimate prepared in regard to the repairs of his vehicle, amounting to $2,021.75.

The issue between the parties is that insurance adjusters, on behalf of defendant, stipulates that it would be uneconomical to repair the vehicle and estimates the marketable pre-accident value of the unit at $750, and salvage value at $200 (see Ex. 3).

Mr. Kenneth Forrest who did this evaluation and was called by the defendant, stated that the factors influencing him in arriving at his valuation are:

(a) age of vehicle, i.e. 9 years;
(b) mileage - 95,000;
(c) tyers - condition which does not influence him very much.

(a) and (b) are the major factors.

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He stated, however, that in November 1974, (at the time of accident) a comparable car in size etc. but not a Dodge Cornet could be obtained. He stated you could get a 1968 Buick at that time for $1,200. He said he estimated the cost of salvage at $200 - 250. That he did so because he could never see a 1965 car being repaired for $2,000.

In cross-examination he stated that he does work for Manton and Hart Insurance Limited who appear to be the insurers for K.S.A.C. That his recommendation as to whether a vehicle should be treated as a total loss or whether it should be repaired is based on value of the car mostly as against the repair cost.

Plaintiff attempted to bring his case within the principles of O'Grady vs. Westminister Scaffolding Ltd. (1962) 2 Lloyds Report 238. This was a case in which the plaintiff owned a 1938 or 1939 M.G. open tourer of the T.B. model. It was meticulously maintained during plaintiff's ownership and up to the time of the accident. The engine was changed no fewer than three occasions during this period.

When plaintiff's vehicle was damaged by the admitted negligence of the defendant, the pre-accident value was assessed at £180, the post-accident scrap value at £35. The plaintiff claimed cost of repairs £253.

It will be seen that the cost of repairs clearly exceeded the pre-accident value of the car.

The Court held, however, that it was reasonable for plaintiff to have repaired the vehicle and held defendant liable for these repairs. The decision was justified by its unusual facts, which made the vehicle unique, so that the standard market value was irrelevant.

I find nothing in the evidence of the plaintiff that would establish anything unique about his vehicle. Plaintiff himself admitted that a vehicle of comparable size would be just as suitable to his needs.

The case Darbishire vs. Warran (1963) 3 A.E.R. p. 310

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was cited and relied upon by the defendant.

The principles extracted from this case are well explained, particularly, in the judgment of Pearson, L.J., at page 314, in which he states at page 314(h):

> " What are the principles applicable? The first and main principle is that the plaintiff is entitled to receive as damages such sum of money as will place him in as good a position as he would have been in if the accident had not occurred. "

Again at page 314(I)

> " Now but for the accident the plaintiff would have continued to have the use of his existing motor car, the 1951 Lea Francis shooting brake, undamaged. The accident deprived him of it. To be restored to substantially the same position, he needed such sum of money, as would enable him to provide himself with an equivalent vehicle, either by having the existing damaged vehicle repaired or by finding and acquiring another vehicle equally good. "
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> " There is however a second principle which was stated by Viscount Haldene, V.C. in British Westinghouse Electric and Manufacturing Co. Ltd. vs. Underground Electric Railways Co. of London Ltd.
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> The fundamental basis is this compensation for pecuniary loss naturally flowing from the breach, but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James, L.J. in Dunkirk Colleery Co. v. Lever, the person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not having done what they ought to have done as reasonable men; and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business. "
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> " For the purpose of the present case it is important to appreciate the true nature of the so-called 'duty to mitigate the loss', or 'duty to minimise the damage'. The plaintiff is not under any actual obligation to adopt the cheaper method, if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant. "

I agree and adopt this approach. Let us now apply these principles to the existing case.

The plaintiff stated that his car is peculiarly suited to his needs because of its size etc. He admitted, however, in

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cross-examination, that another vehicle of the same size would be as good. He admitted also that he never tried to find a replacement for his damaged vehicle. What he did do was to get an estimate for its repairs which amounts to $2,021.75.

The defendant asserts that this is unreasonable because:

(a) the pre-accident value of the car was $750, ascertained on the basis of the age and mileage of the vehicle and a minor factor of condition of the tyres.

By 'pre-accident value' Mr. Forrest, no doubt, means the 'market value' at the time. If this is so, I would accept the definition of 'market value' as enunciated by Pearson, L.J., page 314(g), where he states:

> " There is no complete definition of the expression 'market value' in the evidence or judgment, but I understand it as meaning standard replacement market value that is to say the retail price which a customer would have to pay in July 1962 on a purchase of an average vehicle of the same make, type and age or a comparable vehicle. It is not the price for a sale to a dealer or between dealers. It appears from the judgment that the 'market value' does not include any allowance for the good maintenance and reliability of the plaintiff's vehicle. "

Mr. Forrest for defendant although stating that the 'pre-accident value' is $750, went on to say that:

> " it would be possible in November 1974 (at time of the accident) for a comparable car to the car I saw (plaintiff's vehicle) to be obtained with this size engine quite easily, but not a Dodge Cornet automatic, but a comparable vehicle could be obtained. You could get a 1968 Buick for about $1,200 or a 1969 Buick in 1974."

He later said as adjuster he could not have recommended to Manton and Hart Insurance that they purchase a 1969 Buick to replace plaintiff's car.

Mr. Forrest stated he could not see a 1965 model car being repaired at a cost of $2,000. That in August 1974 (when plaintiff spent $791 on repairs to his vehicle), he Forrest would not have spent $800 to repair that car as the prices of motor cars had come down because of gas prices.

How then would one assess the damages in this case?

I can only cite from the judgment of Pearson, L.J. page 316(c) which I adopt.

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> " It is vital for the purpose of assessing damages fairly between the plaintiff and defendant to consider whether plaintiff's course of action was economic or uneconomic, and if it was uneconomic it cannot (at any rate in the absence of special circumstances, of which there is no evidence in this case) form a proper basis for assessment of damages. The question has to be considered from the point of view of the business man. It seems to me the practical business view is that if the cost of repairing a damaged vehicle is greatly in excess of the market price, one must look around for a replacement and one would expect to find a replacement at a cost not far removed from the market price, although unless one were lucky one might have to pay something more than the standard market price to obtain a true equivalent of a well maintained and relaible vehicle.
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> In my view the defendant succeeds on the issue of principle. The assessment should be based on the market price and not on the much higher cost of repairing the damaged vehicle, and therefore the learned judge's assessment was made on a wrong basis and should be reduced. "

Mr. Forrest's valuation of the pre-accident value of the plaintiff's car is fixed at $750. I cannot accept this figure. Plaintiff's evidence is that on 2nd August, 1974 (exhibit 1) he had repaired his vehicle at a cost of $791.63.

Exhibit 1 is very informative in that it shows by the very extent of the repairs the poor mechanical condition plaintiff's car must have been in to have necessitated such extensive repairs. I would accept, however, that as a result of those repairs, plaintiff's car at the time of the accident was functional and sufficiently efficient to perform satisfactorily in the plaintiff's business. I cannot accept plaintiff's pre-accident valuation of $3,500. It is patently excessive and I attach little weight to it.

Mr. Forrest's evidence that a comparable vehicle in the market could be obtained for about $1,200, illustrates, if nothing else, how unreasonable was his valuation of the pre-accident value of plaintiff's car. It is my view that a reasonable valuation of the comparable car at that time in the market place was about $1,500.

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On such a valuation of $1,500, I would hold that it was uneconomic to repair the unit in the circumstances. The reasonable course was for the plaintiff to have looked in the market place for a replacement to his damaged vehicle.

I would therefore hold that the measure of damages to be as follows:

Replacement of comparable vehicle	-	$1,500.00
Less scrap value	-	200.00
		$1,300.00
Loss of use - three weeks at $50 p.w.	-	150.00
		$1,400.00